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No. 82-234

IN THE

Supreme Court of the United States

October Term, 1982

AUDREY M. LEE, *et al.*

Petitioner(s)

v.

SHIELD PETROLEUM CORPORATION,
VIKING RESOURCES CORPORATION, *et al.*

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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QUESTIONS PRESENTED

I. WHETHER A DISTRICT COURT JUDGE MAY, UNDER RULE 23 (1), FEDERAL RULES OF CIVIL PROCEDURE, DECERTIFY A SECURITIES FRAUD CLASS ACTION CASE *AFTER* A TRIAL HAS CONCLUDED ON THE MERITS?

II. IN A CLASS ACTION SECURITIES FRAUD CASE, WHERE THE DEFENSE OF STATUTE OF LIMITATIONS HAS BEEN RAISED, DOES THE DENIAL OF A TIMELY MOTION TO INTERVENE, AS A MATTER OF RIGHT, CONSTITUTE REVERSIBLE ERROR?

III. WHETHER CERTIFIED COPIES OF FILES MAINTAINED BY THE SECURITIES AND EXCHANGE COMMISSION, AS TO THEIR INVESTIGATIVE FINDINGS, MAY BE INTRODUCED IN EVIDENCE IN SUPPORT OF CLAIMS ALLEGING FRAUD UNDER SECTION 10(b) OF THE EXCHANGE ACT OF 1934 AND UNDER RULE X-10b-5 OF THE RULES AND REGULATIONS PROMULGATED THEREUNDER?

IV. WHETHER THE SALE OF SECURITIES BY A NON-REGISTERED BROKER-DEALER RAISES A CONCLUSIVE PRESUMPTION OF FRAUD UNDER SECTION 10(b) OF THE EXCHANGE ACT OF 1934?

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SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION, *et al.*

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Audrey M. Lee, et al., petition this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Petitioner filed a Complaint, asserting class action violations, of Sections 17(a) of the Securities Act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder. Petitioner sought money damages and recission on behalf of herself and two classes of investors namely (a) those investors who invested in oil and gas drilling ventures sold by Shield Petroleum Corporation and (b) limited partnership interests in other oil and gas drilling ventures, sold by Viking Resources. One of the Defendants named

in the Complaint, James C. Eigel, controlled Shield Petroleum Corporation and Viking Resources through a myriad of corporate identities.

ORDERS AND OPINIONS

On July 12, 1977, the District Court granted the Petitioner's Motion allowing the action to proceed as a class action. Notice of Class Action was duly published. *Appendix A.*

The cause proceeded to Trial before the Court, as a class action on July 3, 5, 6, and 7, 1978. On September 13, 1978, the District Court entered a Judgment dismissing the Complaint. *Appendix B.* The Court made Findings of Fact, entered an Opinion and entered Conclusions of Law. *Appendix C.*

Petitioners filed a Motion for Reconsideration and to Vacate Judgment. The Court denied that Motion. *Appendix D.*

Petitioner filed a Motion su supplant the trial record by submittal of Certified Copies of the S.E.C. files. On September 13, 1978, the Court denied the Motion as moot in light of the Court's Statute of Limitations ruling which defeated the Petitioner's claims. *Appendix E.*

Petitioner noted an Appeal from the Trial Court's Orders and Judgments. The cause came on to be heard before the United States Court of Appeals for the Sixth Circuit. On March 23, 1982, the Sixth Circuit Court of Appeals affirmed the District Court's Judgment and Orders. *Appendix F.*

On April 22, 1982, the Court of Appeals entered an Order ruling that the mandate in the above entitled Appeal was "improvidently issued". *Appendix G.*

Petitioner filed a Petition for Rehearing and Petition for Rehearing en banc. On June 11, 1982, the Court of Appeals denied the Petition for Rehearing. *Appendix H.*

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

FEDERAL STATUTES INVOLVED

Section 17(a), Securities Act of 1933, 15 U.S.C. 77q(a).

Section 10(b), Securities Exchange Act of 1934, 15 U.S.C. 78j(b).

Section 15(a)(1), Securities Exchange Act 1934, 15 U.S.C.

FEDERAL REGULATIONS INVOLVED

17 C.F.R. 200.80 (b) (5), Section 552 (b) (5).

FEDERAL RULES INVOLVED

Rule 23, (c) (1), Federal Rules of Civil Procedure. (Class Actions).

STATE STATUTES INVOLVED

Section 2305.09 (c), Ohio Revised Statute.

STATEMENT OF THE CASE

The Petitioner, Audrey Lee, brought an action in the United States District Court for the Southern District of Ohio, Western Division, seeking damages against the Respondents due to violations of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), Rules 10b-5 of the Securities and Exchange Commissions Rule promulgated thereunder. Petitioner also sought damages due to common law fraud and further sought Accounting.

The Respondents consist of (a) Shield Petroleum Corporation, (b) Viking Resources Corporation and (c) James E. Eigel, who controlled and owned Shield and Viking via another cor-

poration, not a party to these proceedings, named Nordic Oil Corporation. The litigation also involved certain conduct engaged in by James C. Eigel, acting through Viking Resources Corporation, which promoted oil and gas programs called Viking Oil and Gas Program 1970, 1971 and 1972. The litigation also involved certain conduct engaged in by James C. Eigel via his oil and gas partnership ventures after 1972. Petitioner did not invest in the Viking Oil and Gas Programs nor did she invest in the Partnership Ventures solicited by the Respondents after 1972 Her investments were restricted to investments before 1972. Her investments were restricted to investments in the Knight Numbers 1 and 2 wells, the Laura Kidd Numbers 3 and 4 wells, and the C. Burke three (3) well program.

Petitioner sought Certification of the action as a Class Action. On July 12, 1977, the Trial Court determined that the Action could proceed as a Class Action.

Notably, Respondents had pleaded, as an affirmative defense, the Statute of Limitations. After extensive discovery, the cause proceeded to Trial before the Court, sitting without a Jury, on July 3, 1978.

In June, 1978, approximately several weeks prior to actual Trial, a Motion to Intervene was filed on behalf of Robert Levine and William Milleck, both investors in the Viking 1970, 1971 and 1972 Oil and Gas Programs. During the Trial on the merits, Petitioner requested a ruling by the Trial Court on the Motion to Intervene. The Trial Court refused to rule on the Motion, however. At the conclusion of the Trial, Petitioner made an oral motion for leave to supplement the Trial Record with a certified copy of the Securities and Exchange Commission's Investigatory File pertaining to Shield Petroleum, James C. Eigel, and Viking Resources Corporation. The Court granted the Motion to the extent that only the conclusions found by the Securities and Exchange Commission would be admitted and not the Commission's entire Investigatory files. Whereupon, the Trial was concluded on July 7, 1978.

Petitioner filed a post trial Motion for Submittal of Evidence

which included the entire certified investigatory file compiled by the Securities and Exchange Commission.

On September 13, 1978, the Trial Court ruled that in light of the Judgment and Order entered on the merits, the Motion was denied as moot.

On September 13, 1978, the Trial Court entered it's Findings of Fact, Opinion and Conclusions of Law. Whereupon, the Trial Court entered a Judgment dismissing the Petitioner's Complaint upon the ground that the claims were barred by the Statute of Limitations, and further decertifying the Class Action upon the ground that since the Petitioner's claims were barred by the Statute of Limitations, her claims were not typical of a class of claimants whose similar claims may not be so time barred.

Petitioner thereafter filed a Motion for Reconsideration and to Vacate Judgment and Order. On January 3. 1979, the Trial Court entered an Order denying the Motion.

An Appeal was filed to the Sixth Circuit Court of Appeals. On September 13, 1978, the Sixth Circuit Couirt of Appeals affirmed the Trial Court's Judgment and Order. *Appendix C.* Subsequently, post trial motions were denied, including an error in a Mandate Order which the Court declared had been "improvidently granted". *Appendix D, E, F, G & H.*

STATEMENT OF THE FACTS

1. For a period beginning in 1965, Respondent James C. Eigel was engaged in the business of selling to investors fractional shares in proposed oil and gas wells. From 1965 to approximately 1972 he operated under the corporate name of Shield Petroleum Corporation, an Ohio Corporation. Subsequent to 1972 he operated under the name of Viking Resources, a wholly owned subsidiary of Shield Petroleum Corporation. At no time was James C. Eigel, Shield Petroleum or Viking Resources registered as a broker/dealer with the Securities Exchange Commission.

2. During a period from December, 1969, through December, 1971, Petitioner Audrey Lee invested $5,471.88 with Shield Petroleum Corporation. She never invested with Viking Resources. Her investment purchased a 1/64th interest in each of four wells identified as Laura Kidd No. 3, Laura Kidd No. 4, C. Burke Morris, and Knight No. 1. Plaintiff also purchased a 3/64th interest in a well identified as Knight No. 2.

3. Consolidated Gas Company of West Virginia owns mineral rights in large areas of the State of West Virginia. These rights grant to Consolidated Gas Corporation the right to drill for oil and gas subject to the payment to the owner of the fee simple title of 1/8 of all amount received from sale of the oil or gas. Consolidated Gas Corporation will grant to third persons what is in effect a sublease upon terms and conditions negotiated between them. Such subleases are known as "farm-out agreements" and will be referred to as such hereafter.

Shield Petroleum Corporation negotiated farmout agreements with Consolidated Gas Corporation for each of the five wells in question. Shield was required to pay as consideration therefor a 1/8th royalty, known as an "override" to Consolidated Gas and was required to sell to Consolidated at a specified price all gas or oil recovered.

4. It was the procedure of Shield Petroleum Corporation to sell interests in each well in 1/64th denominations. The sales of such interests set forth a specific sum for 1/64th for drilling the well and an additional sum for completion costs.

The cost of a well is divided into two segments. First, the cost of drilling a hole to a specific agreed upon depth; and second, to place casing therein, seal the casing with cement, perform an operation known as "hydro-fracing" and attach the well to either a gas or oil pipeline. This division of costs enables the well driller to decide whether or not to complete the well after the agreed depth has been reached. Contracts providing a fixed cost for drilling and for completion are known as "turn key" contracts as distinguished from a contract providing a cost per foot of drilling and completion. All contracts referred to herein were of the turn key variety.

5. Details as to each of the wells in question are as follows:

A. The "C. Burke Morris Well" was actually a three-well program located in Gilmer County, West Virginia. Drilling rights were acquired by Shield from Consolidated Gas Corporation in a farm-out agreement dated June 30, 1969. Interests in the three-well program were sold at $1050.00 for a 1/64th interest in the three wells from drilling and $395.00 for a 1/64th interest in the completion of each individual well. Drilling for Morris Well No. 1 commenced on July 20, 1970, and reached a depth of 1970 feet. Drilling for Morris Well No. 2 commenced on August 14, 1970 and reached a depth of 2,000 feet. Drilling for Morris Well No. 3 commenced on October 9, 1970 and reached a depth of 2071 feet. All three wells were completed and remained in production until April of 1974 when the wells were sold to the Polumbus Corporation. Shield Petroleum Corporation had retained 18/64ths in these wells.

B. The "Knight No. 1 Well" was located in Calhoun County, West Virginia. Drilling rights were acquired by Shield from W.T. Parks in a farm-out agreement dated June 19, 1970. Interests in this well were sold at $150.00 for a 1/64th interest for drilling to the casing points and $375.00 for a 1/64th interest in the completion of the well. Drilling for Knight No. 1 commenced on July 20, 1970, and reached a depth of 2035 feet. This well was completed and remained in production until April of 1974 when it was sold to the Polumbus Corporation. Shield Petroleum retained 33/64th in this well.

C. The "Knight No. 2 Well" was also located in Calhoun County, West Virginia. Drilling rights were acquired by Shield from W.T. Parks in the June 19, 1970 farm-out agreement. A 1/64th interest for drilling to the casing point sold for $150.00 and the cost of completion for a 1/64th interest was $375.00. Drilling for Knight No. 2 commenced on August 18, 1970, and reached a depth of 2066 feet. This well remained in production until April of 1974 when it was sold in

the transaction with Polumbus Corporation. Shield Petroleum Corporation retained a 41/64th interest in this well.

D. The "Laura Kidd No. 3 Well" was located in Gilmer County, West Virginia. Drilling rights were acquired by Shield from Consolidated Gas Corporation in a farm-out agreement dated May 15, 1969. A 1/64th interest was $375.00. Drilling commenced on January 26, 1970, and reached a depth of 1736 feet. This well was plugged and abandoned on February 27, 1970. Shield Petroleum Corporation retained a 17/64th interests in this well.

E. The "Laura Kidd No. 4 Well" is also located in Gilmer County, West Virginia. Drilling rights for this well were also acquired from Consolidated Gas Corporation in a farm-out agreement dated May 15, 1969. A 1/64th interest from drilling to the casing point sold for $350.00 and the cost of drilling to completion was $390.00 for each 1/64th interest. This well included in the transaction with the Polumbus Corporation in April of 1974. Shield Petroleum Corporation retained a 38/64th interests in the Well.

The evidence disclosed, uncontrovertedly, that the Respondents acted as Broker-Dealer and as such, failed to register with the Securities and Exchange Commission as to a Number of the Securities offered to the public.

In 1970, Viking offered its 1970 oil and gas programs to the public but failed to Register with the S.E.C. as Broker-Dealer. In 1971, Viking offered its 1971 Oil and Gas Programs to the public but failed to Register with the S.E.C. as Broker-Dealer.

Among the questionable practices by Respondent, Eigel consisted of withdrawing sums of money, for example, $100,000 from the Shield Petroleum account payable to Nordic Oil Corporation as a Divident. Respondent Eigel admitted that he was 100% owner of Nordic Oil Corporation.

In a series of inter-locking corporate acts, Shield paid rent to

Viking from the Shield Royalty Account. After various Shield Programs were closed, unused leases were assigned over to Viking.

As a matter of fact Shield had already drilled on some of the leases which it had assigned to Viking. Yet Viking represented facts, regarding acquisition of those leases, in a different light to its investors. In the 1970 Viking oil and gas program prospectus, Viking represented that geographical areas had not then been determined (for drilling) when in truth and in fact, some of those areas had been determined such as the C. Burke Morris lease in West Virginia. Throughout the life of Shield and Viking, funds were diverted from Shield Bank Accounts and transferred to Viking Partnership. In another transaction, which was unknown to Viking Investors, $650,000 was paid into the Viking Bank Account but was subsequently transferred to the Shield Regular Checking Account as part of the arrangement between Shield and Viking. Under the Viking programs, Shield acted as Drilling Operator, charged Viking funds for those "services" and then sub-let or entered into contracts with other independent drillers. On July 11, 1972, Viking paid Shield the sum of $5,300 in "just an inter-company transaction." At no time did Shield or Viking put "risk venture capital" in any of the Shield or Viking Programs other than in programs in which 48th/64 interests had not been sold. Shield extracted substantial sums of money from the Shield Royalty Account at the expense of the investors who received nominal sums. In February, 1974, Shield opened and maintained a checking account labelled "Shield Petroleum, Coopers and Lybrand", the latter being certified Public Accountants of Shield. In February, 1974, that account was opened with a deposit of $513,671.47. In the same month, the amount of $505,630.56 was withdrawn from the account. In March, 1974, $506,027.57 was deposited to the account and $532,580.55 was withdrawn from the Cal-Viking Partnership. The original $500,000 in a Certificate of Deposit was renewed in smaller amounts, during the month of February and March. 1974 to cover the cost of drilling twelve gas wells. In other transactions between Viking and Shield, inter-company loans were made but this fact, as all others, was not stated in any communication to investors by neither Shield nor Viking.

In 1972, *Respondents* Eigel became a member of the National Association of Securities-Dealers, but resigned in 1975. *Respondents* Eigel was asked the reason for his resignation at which time opposing counsel objected. The Court sustained the objection. Nor did the *Respondents* Register as Broker-Dealer with the S.E.C. until 1972. Nonetheless, from 1969 (under the Shield programs) to 1972 (under the Viking Oil and Gas Programs), oil and gas securities were sold to the *Respondents* in interstate commerce, without compliance of Registration by Eigel, Shield and Viking.

In 1970, 1971 and 1972, Viking established a "Custodian" rather than an "Escrow" Account with the National Bank of North America. The Custodian Account authorized Viking and Eigel to direct the Bank to pay such amounts as was requested by Viking and Eigel.

THE VIKING OIL AND GAS PROGRAMS

1. Viking, organized with funds derived from the Shield Joint venture, had as its sole purpose of extracting illegally, funds from the same investors who had initially invested in Shield and had lost all of their investments.

2. Eigel is the principal officer and director of Viking as well as its majority shoreholder, is President, Chief Operating Officer and Chairman of the Board of Shield and Viking respectively; owns approximately 70% of shares or interest in Shield and Viking.

3. Shield and Viking offered and sold interests to the public in various joint ventures and limited partnerships or through shares of stick with them as agents. Purpose of ventures purportedly to finance the acquisition, testing, development and operation of oil and gas leaseholds.

4. Respondents through the offer, purchase and sale of interests in oil and gas programs, obtained money and property using false statements of material facts and omissions to state material facts necessary to avoid misleading statements, also devices, schemes and artifices to defraud; and engaged in tran-

sactions, acts, practices and courses of business which operate as a fraud and deceit upon the investors.

5. 1969-1976 Respondents entered into program agreements with public investors whereby they as the agents for the investors were given certain duties and obligations; these were set forth in Shield and Viking prospectuses and were part of SEC registration statements, the public received these agreements and prospectuses.

6. These drilling programs were a series of "Non-Producing Working Interests" or limited partnerships, with Shield and Viking as the general partner and the particular as the limited partners.

7. Respondents have made further developmental calls to investors to raise dollars to develop already owned leasehold interests and to buy and develop acreage off-setting initial exploratory drilling; over several million dollars have been raised this way.

8. Public information and documents inadequately described the misuse, diversion and/or misappropriation by Respondents and others as dollars invested by and assets belonging to participants.

9. Such documents failed to disclose the misuse of drilling programs' gas reserve by certain Respondents and others for their personal benefit.

10. Such documents failed to disclose the manner and timing of leasehold acquisitions.

12. Such documents failed to disclose Respondents' skimming off of various oil and gas leasehold interests.

13. Such documents failed to disclose amounts paid as commissions for the sale of drilling program interests to the public.

14. Such documents failed to disclose Respondents' failure to maintain the promised Central Trust Bank Escrow Account as stated in Schedule D.

15. Such documents failed to disclose Eigel's withdrawal of funds from the Escrow Account for his personal use.

16. Such documents failed to disclose Respondents' use of said funds for Shopping Center construction, pleasure trips, other stock purchases, etc. rather than solely for drilling.

17. Such documents failed to disclose the transfer of Shield funds to Viking Resources Treasury set up by Eigel to finance Viking projects.

18. Such documents failed to disclose the numerous interests reserved for Eigel's immediate family.

19. Such documents failed to disclose Respondents' disbursement of only minimal fractional royalty payments, not the royalty payments equal to each investor's interest.

20. Such documents failed to disclose Respondents' manipulation of figures for royalty payments, using a calculation whereby each investor was paid royalties substantially less than the interest purchased by payment of drilling and completion costs.

21. Such documents failed to disclose Respondents' failure to pay West Virginia sales tax although they charged investor therefor.

22. Such documents failed to disclose Respondents' awareness that the wells were mostly minimally productive; "bad wells" or potentially dry wells, while, at the save time, demanding investors to pay the completion costs for these wells.

23. Such documents failed to disclose that promises made to SEC and to investors concerning each well's potential production capability were not based on technical geological data, as no professional geologist was ever engaged by Respondents to determine such prior to selling interests in these wells.

24. Respondents placed into such drilling programs some wells known to be drilled and abandoned before the program was even formed.,

25. Eigel, acting by and through Shield and Viking, with others, skimmed off valuable free carried working interests in drilling prospects, without disclosing such to investors.

26. After several drilling program offerings had begun, Shield allocated development calls payments in a previously offered drilling program to its then current offering without making such disclosure.

27. Nearly all Eigel's revenues and assets have been derived from transactions with Shield Nearly all Viking's revenues and assets have been derived from transactions with Shield and Eigel. These funds have been and are being used for Respondents' personal use and benefit, however, they rightfully and legally belong to the investors in the form of either royalty payments, completion cost of other.

28. As a result of Shield's merger into Viking, completed in 1974, Eigel solidified his ownership and control of Viking. Through this means Eigel diverted money from public drilling program and defrauded the investors of large sums of money.

29. Although documents stated that participants would be charged for only those expenses necessarily incurred in connection with the drilling programs, they were in fact charged for many of Respondents' unrelated expenses.

30. Among Respondents' personal and other expenses charged to the drilling programs were private home, automobiles clothing, liquor, vacation and trips by Eigel's friends and relatives, stock purchases in various Eigel corporations, purchases of interests in shopping centers and other business ventures.

31. Eigel with and by use of Shield and Viking, participated in this scheme, using the companies as conduits through which investors' monies were diverted to Respondents and other's personal use.

32. From 1969-1974 substantial sums were diverted from the drilling program accounts into Shield's bank accounts and then most of this money went to relatives of and companies controlled by Eigel, along with others.

33. In or around 1974, Eigel caused Shield to merge with Viking in futherance of the scheme to misappropriate investors' monies which had been and were being diverted into Viking under Eigel's control.

34. The custodian accounts were, in fact, shams; Eigel did not comply with the custodian agreements requirements, thus depriving participants of protection purportedly afforded by said agreements; public offering proceeds were transferred to Eigel's personal Central Trust Account and then withdrawn therefrom, rather than disbursed pursuant to vouchers for expenditures as was represented to investors; the disbursement of monies by Viking and by Shield directly to Eigel facilitated this misappropriation, commingling and misuse of investors' monies.

35. Registration Statement and other documents represented the segregation and maintenance of separate custodian accounts for proceeds from the sale of various drilling funds and that defendants would perform other custodial services when, in fact, the proceeds went into Eigel's accounts.

36. Registration Statements and other documents represented that only expenses necessary to the operations of the drilling programs would be charged to participants, when in fact, defendants' and other's personal expenses were charged to the public drilling program.

37. James C. Eigel and Shield Petroleum Corporation illegally used funds from Shield's Regular Account and Shield's Royalty Account to finance Viking Resources Corporation.

38. All gas wells in Shield and Viking Programs were sold without investors' consent contrary to written representation made by Shield and Viking and Eigel

39. Shield and Viking relied on old Geology Reports and failed to obtain updated geology reports when they knew that the leases had been "conditional" as to title, under Farm-out Agreements which Shield and Viking failed to make full disclosures.

SUMMARY OF ARGUMENT

I. A Trial Court may not decertify a class action, previously certified, after a Hearing on the Merits upon the ground that the representative plaintiff was not "typical" in light of statute of limitations questions. The presence of individual questions of Statute of Limitations does not prevent certifications nor dies it establish a basis for decertification of class actions in securities cases.

II. The Trial Court erred in denying a Motion to Intervene as a matter of right, made by an investor who claimed an interest relating to the transactions which was the subject matter of the pending action where the Motion was timely made, depositions had been taken and such intervention would not have prejudiced the Defendant/Respondents nor impeded the course of the litigation.

III. The Trial Court erred in denying Petitioner's Motion to Supplant the Trial Record by filing certified copy of the Securities and Exchange Commission's Investigatory file relating to the results of an investigation into Shield and Viking's practices in selling securities.

IV. The sale of Securities by a Broker-Dealer who has failed to register with the Securities and Exchange Commission raises a conclusive presumption of Fraud as to all investors under Section 10(b) of the Exchange Act of 1934 and in violation of Section 15(a) (1), of the Exchange Act of 1934.

REASONS FOR GRANTING THE WRIT

Petitioner(s) contend that the Petition for Writ of Certiorari should be granted for the stated reasons as follows: (a) The Sixth Circuit Court of Appeals has rendered a decision in the above cause which is in conflict with the decisions of other Courts of Appeal involving similar issues, (b) the Sixth Circuit Court of Appeals has decided a federal question involving the Securities Laws of the United States in such a way as to conflict with prior decisions of this Court, and (c) the Sixth Circuit Court of Appeals has so far departed from the accepted and

usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. The foregoing reasons are more fully supported by a discussion of the case law demonstrating the conflicts of laws and the departure from previous decisions emanating out of this Court and which conflict with the decisions emanating out of other Circuit Courts of Appeals.

I

A DISTRICT COURT MAY NOT DECERTIFY A CLASS ACTION SECURITIES FRAUD CASE AFTER A TRIAL ON THE MERITS HAS CONCLUDED UNDER RULE 23(c)(1), FEDERAL RULES OF CIVIL PROCEDURE.

On July 12, 1977, the District Court for the Southern District of Ohio, Western Division, entered an Order allowing Petitioner's Class Action Securities Fraud Complaint to proceed as a Class Action. On September 13, 1978, the District Court Decertified the action as a class action *after* a trial had concluded. (*Appendix C*).

Rule 23(c)(1), Federal Rules of Civil Procedure provide as follows:

> "(1) As soon as practicable after the commencement of an action brought as a class action, the Court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and *may be altered or amended before the decision on the merits.*" (Emphasis supplied).

The issue then, is whether or not a Federal District Court may decertify a class action after a trial has been held on the merits? Prior cases discussing *Rule 23 (c) (1)* are directly targeted to the overall supervisory power of a Federal Judge in Class Action Litigation. But that supervisory power does not vest the Court with all power which is unquestioned or gauged against standards of sound discretion as opposed to abuse of discretion. To be sure, *Rule 23 (c) (1)* discreetly grants the power before a Trial

on the merits and not after a trial has been held on the merits. As a general rule, an order entered by a District Court decertifying a class action may be reversed only for an abuse of discretion. *Paton v. La Prade, 524 F. 2d 862, 875, (3rd Cir., cert. den., 421 U.S. 1011, 95 S. Ct. 2415 (1975).* Those cases establish a standard for Federal Courts "before the decision on the merits" and not *after* (emphasis supplied) a trial has been held on the merits. In a speech before the Judicial Conference, Judge Frankel (U.S. District Court, Southern District of New York) cautioned District Courts against reliance upon their broad powers to "alter or amend" certification of a class action under *Rule 23 (c) (1), F.R.Civ. P.* Judge Frankel had this to say:

> "My suggestion is that we should avoid finding too much comfort in this assurance that there will be time to correct mistakes. For example, to revert to the annoying question of statute of limitations, what happens if a Court upholds a class action under (c) (1), then chages its view at a later date when the statute has run?

In the pending case, although the Court was aware that extensive discovery had been conducted and there was indeed time within which a Motion to Decertify the class actoin could have been filed, a Motion to that effect was not filed, nor did the Court entertain such a Motion sua sponte which It certainly had the power to do. Notedly, the Trial Court in it's Conclusions of Law concluded as follows:

> "B. Where a plaintiff's claims are barred by statutes of limitations such plaintiff is not typical of a class of claimants whose similar claims may not be so time barred and such plaintiff may not act as a representative in a class action." (*Appendix c*).

The Court's conclusion was incorrect. Moreover, the Sixth Circuit Court of Appeals did not even address that issue in it's decision even though Counsel had briefed the point. (*Appendix F*).

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[1]Frankel, Marvin E., Judge, U.S. District Court for Southern District of New York, *Some Preliminary Observations Concerning Civil Rule 23, (1967), 43 F.R.D., 42.*

To be sure, there was no question as to the interlocutory effect of the decertification order since that order was included in a final judgment. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974); Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541 (1949).* Even under the finality doctrine, the Sixth Circuit Court of Appeals ignored a critical issue. Inherent in the decertification issue was the issue of the statute of limitations. (*Appendix C*). Ignoring the issue or, in the very least, an erroneous ruling on that issue poses sufficient reasons for this Court to grant certiorari. In class action cases, where the representative plaintiff may collide into a statute of limitations defense, the law is well settled that given a sufficient nucleus of common questions, the presence of the individual issue of compliance with the statute of limitations does not prevent certification of a class action in securities fraud cases. *Umbriac v. American Snacks, Inc. 388 F. Supp. 265, 272 (E.D. Pa. 1975); Cohen v. District of Columbia National Bank, 59 F.R.D. 84, 90 (D.D.C., 1972); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y., 1968).* Conversely, individual issue of compliance with the statute of limitations is not sufficient grounds nor reasons for decertification of a class action *after* a trial has been had on the merits. *Rule 23(c) (1), F.R. Civ. P.* In yet another decision, on point, the Ninth Circuit Court of Appeals held that the presence of individual Issues of compliance with the statute of limitations did not defeat the predominance of common questions. *Cameron v. Adams & Company, etc. 547 F. 2d 473 (9th Cir., 1975).* What the District Court effected in it's decertification order and the Sixth Circuit Court of Appeals compounding of that erroneous Order spelled the Death-Knell of the Class Action. *Cohen v. Beneficial Industrial Loan Corp., supra; Eisen v. Carlisle & Jacquelin, supra; Parkinson v. April Industries, Inc. 520 F. 2d 650 (2nd Cir., 1975); cf. Weight Watchers of Philadelphia, Inc. v. Weight Watchers International Inc., 455 F. 2d 770, 773 (2nd Cir., 1972).*

II

IN CLASS ACTION LITIGATION, THE DENIAL OF A MOTION TO INTERVENE AS A MATTER OR RIGHT CONSTITUTES REVERSIBLE ERROR.

The magnitude of lower court errors in denying the Motion for Intervention as a matter of right is grounded upon the Court's final judgment, decertifying the class because it felt that since a statute of limitations problem existed as to the representative plaintiff, she could not possibly represent the class. Conversely, had the Motion been granted, the class of representative plaintiffs would have been expanded to two or three persons whose claims were not barred by the statute of limitations.

Under *Rule 24(a), Federal Rules of Civil Procedure* it is provided as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervent in an action: (1) when a statute of the United States confers an unconditional right to intervent; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The District Court's denial of the Motion to intervene as a matter of right and the Sixth Circuit's side-stepping of that issue constituted a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Where a party seeking intervention has an interest relating to the subject matter, property or transaction, intervention, as of right, is liberally granted. The decisions of this Court so hold. *Cascade Natural Gas v. El Paso Natural Gas, 386 U.S. 129, 87 S. Ct. 932 (1967); Trbovich v. United Mine Workers of America, 404 U.S. 528, 92 S. Ct. 630 (1972); Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S. Ct. 666 (1941).* Adequacy of representation requirement under *Rule 24(a)* must be read conjunctively with the re-

quirements of *Rule 23* which provides for class action certification pending sufficient compliance with the standards set inorder to determine certification. A denial of the Motion to Intervent as a matter of right was contrary to decisions by the same Circuit (Sixth). See *Marshall v. Local 299, Intern. Broth. Teamsters, etc. 617 F. 2d 154 (6th Cir., 1980); Kyles v. First Tennessee Bank 634 F. 2d 349 (6th Cir., 1980).* Timeliness of the Motion was not decisive since the deposition of the proposed intervenor had been taken prior to trial. *Nat. Association for Advancement of Colored People v. New York, 413 U.S. 345, 93 S. Ct. 2591 (1973).* Indeed, in denying the Motion to Intervene as a matter of Right under *Rule 24(a),* the Court's action constituted a conclusion of law rather than the exercise of it's discretion ordained under *Rule 24(b)* which did not come into play in any event.

III

CERTIFIED COPIES OF INVESTIGATIVE FILES OF THE SECURITIES AND EXCHANGE COMMISSION REPRESENTS SUBSTANTIAL PROOF OF FRAUD UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE COMMISSION'S RULES AND REGULATIONS PROMULGATED THEREUNDER 17 C.F.R. 200.80 (b) (5).

The Trial Court granted leave to supplant the Trial Record with certified copies of the S.E.C.'s investigatory files. Seemingly, the entire spectrum of District Court and Appellant Court error was grounded upon the Court's belief that since the representative Plaintiff did not invest in the Viking Resources Programs, she could not adequately represent the Viking investors. That conclusion was likewise repugnant to this Court's decision in *Eisen v. Carlisle & Jacquelin, supra,* which addressed itself to the question of division of classes into subclasses and sub-sub-classes in order to preserve judicial economy.

The Courts in other Circuits have long since held that disclosure of vital information contained in the Commission's

investigatory files are relevant and indeed impactive. See *Frankel v. S.E.C. 460 F. 2d 813 (2nd Cir., 1972), cert. den. 409 U.S. 889.* Moreover, records created by agencies of government and which are produced are inadmissible in evidence against relevant defendants. *In re Plumbing Fixtures, 311 F. Supp. 349, 350 (W.D. Okla. 1970); State of West Virginia v. Chas. Pfizer & Co., Inc. 314 F. Supp. 710 (S.D.N.Y., 1970), affirmed, 440 F. 2d 1079 (2nd Cir.) cert. den. 404 U.S. 871.* These files contained clear omissions and admissions of liability as well as admissions of Securities Act violations by the Respondents.

IV

THE SALE OF SECURITIES BY A NON-REGISTERED BROKER-DEALER RAISES A CONCLUSIVE PRESUMPTION OF FRAUD UNDER SECTION 10 (b) AND SECTION 15 OF THE SECURITIES EXCHANGE ACT OF 1934.

The District Court found that the Respondents, James C. Eigel, Shield Petroleum Corporation, and Viking Resources had failed to register with the Securities and Exchange Commission as a Broker/Dealer. (*Appendix C*). The District Court also ruled that the absence of proper registration by Respondents did not amount to a claim of fraud. (*Appendix C*).

Factually, the Respondent, Shield Petroleum Corporation, between 1969 and 1970, offered, in interstate commerce, fractional oil and gas investment contracts. These contracts were known as "turnkey contracts". In 1969-70, Shield sold various interests to the investing public in the following programs: Knight #1 Well, Knight #2 Well, C. Burke Morris (three well program), Kidd #3 Well, and Kidd #4 Well. In 1970, Viking Resources Corporation was organized by Respondent Eigel. During that Year, Viking sold Units in it's 1970 Oil and Gas Drilling Program. In 1971 and 1972, Viking changed it's offer from the sale of Units to a public offering of Limited Partnership interests in various Oil and Gas Partnership Ventures known as (a) Cal-Viking Partnership, (b) Spurrier-Eibel Partnership, (c) The Viking-Wilt Partnership (d) The Viking-

McAtee Partnership, and (e) the Salem-Viking Partnership. With the exception of the 1972 Oil and Gas Program, neither Shield nor Viking had registered with the Securities and Exchange Commission as a Broker/Dealer prior to making those Public Offerings.

Section 15 (a) (1) of the Exchange Act of 1934 provides as follows:

> "No broker or dealer . . . . shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section."

Section 3(a) (4) of the Exchange Act defines a Broker as follows:

> "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank."

Section 3(a) (5) of the Exchange Act defines a Dealer as follows:

> "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise."

The issue raised then, is whether a Broker-Dealer who fails to Register as such with the Securities and Exchange Commission and who, during the period of non-registration, sells securities, is guilty of violation of Section 15(a) (1) of the Exchange Act of 1934 thereby entitling investors to recission of the investment contracts under Section 29(b) of the Exchange Act?

Failure of a Broker-Dealer to register with the Securities and Exchange Commission can result in staggering civil liability. Presumably, the rationale behind the declaration of voidance of

sales made in interstate commerce by a Broker-Dealer not registered with the Commission appears to lie in the fact that Dealers not so registered are not subject to Commission scrutiny by S.E.C. investors are therefore not protected. The authorities support the view that where sales are made by a Broker-Dealer, not registered with the Commission, are declared void, the purchasers (such as the Petitioners in this action), would be entitled to recission. In other words, each investor in the Shield and Viking Oil and Gas Driling Programs would be entitled to rescind each sale and seek restitution of the initial amounts invested by them. In *Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (C.A. 9th, 1964),* it was held that purchasers of securities, alleging that the sellers had not registered with the Commission as is required under *Section 15(b),* were entitled to maintain a class action seeking recission or damages if recission is not possible.

In *Eastside Church of Christ, et al. v. National Plan, Inc., et al. 391 F. 2d 357 (C.A., Tex. 1968), cert. den. 89 S. Ct. 234, 240, 393 IU.S. 913* that an unregistered broker which purchased bonds issued by several churches from a builder who received those bonds from the churches as an agent was not exempt from registration under the Securities Exchange Act of 1934 and the churches could void the transactions with the broker as being in violation of the Exchange Act without establishing that any harm resulted from the broker's failure to register. The Court opined, after ruling that National Plan was acting as a broker and dealer, as follows:

> "It follows that the purchasers which National made from the appellant churches through their agent Paden were in violation of *Section 15(a) (1)* of the Exchange Act, supra. The question next arises whether appellants may void these transactions because National acted in violation of #15 (a) (1) of the Act. *Section 29 (b) of the Act, 15 U.S.C.A. #78cc(b),* supra, provides that 'every contract made in violation of any provision of chapter or any rule or regulation thereunder **** shall be void **** as regards the

> rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract ****'. There are exceptions to this voiding provision but none is applicable here. *Section 29(b) also contemplates civil suit for relief by way of recission and damages where the transactions are void.* (emphasis supplied), *Cf. Osborne v. Mallory, 86 F. Supp. 869, 879 (S.C.N.Y. 1949); Kardon v. National Gypsum Company, 69 F. Supp. 512, 514 (E.D. Pa., 1946); Geismar v. Bond & Goodwin, 40 F. Supp. 876, 878 (S.D.N.Y., 1941), and see dictum in Goldstein v. Groesbeck 142 F. 2d 422, cert. den. 323 U.S. 737, 65 S. Ct. 36 (2nd Cir., 1944)."*

In Eastside Church of Christ, supra, the Court further ruled that in order for an investor to seek recission, her or she need only show that (a) the prohibited transaction occurred and, (b) the investors were in the class sought to be protected. *Id at pp. 362.* In *Deckert v. Independent Shares Corp. 61 S. Ct. 229, 311 U.S. 282 (1940),* the Supreme Court held that contracts which are void under *Section 29(b), 15 U.S.C.A 78cc (bb)* are subject to recission but investors may seek damages as well. Accordingly, petitioners are entitled to seek recission and damages since Shield, Eigel and Viking failed to register with the S.E.C. as Broker-Dealer prior to offering the investments for sale to the public.

The Court may also look to the Ohio State Revised Code which affords a similar remedy. Under *Section 1707.43, Ohio Revised Code,* the legislature provided as follows:

> "Every sale or contract for sale made in violation of sections 1707.01 to 1707.45, inclusive, of the Revised Code, is voidable at the election of the purchaser ****".

Petitioners do not suggest, however, that *Section 1707.43, supra,* is controlling for the reason that the State of Ohio did issue Dealers Licenses to James C. Eigel each year, beginning in 1965. Those licenses were issued to the Respondent authorizing him to engaged in intra-state sale of similar securities. The con-

trolling import of the section lies in the Respondent's classification as a "Dealer" and the remedy of recission afforded to defrauded purchasers of securities.

FAILURE TO DISCLOSE CAPACITY AS A BROKER-DEALER IS A MATERIAL OMISSION WHICH SATISFIES RULE 10b-5 CLAIMS.

The purpose of *Section 15 (a) (1)* of the *Exchange Act of 1934*, is to regulate the sale of securities by those persons, be they brokers or dealers, by providing certain disciplines such as requiring that those persons so engaged have the proper training, experience and keep proper records. The provision and its requirement is mandatory and is of utmost importance. *Eastside Church of Christ v. National Plan, Inc., supra.* Once registered, the Securities and Exchange Commission may identify those persons engaged in interstate sales of securities and impose reasonably rigid requirements as to testing, training, and other qualifications. *Re Ben Zenoff Co., Securities Exchange Act of 1934, Release No. 9416,, (Dec. 13, 1971), CCH. Red. Secur. L. Rep. #78468.* The Respondents business in the sale of securities in the case at Bar was subject to those regulations. Yet they failed to register each year even though Shield, for example, knew that it had become subject to an S.E.C. Investigation as to a number of other matters. *(Exhibit #306) (S.E.C. File).*

A failure to Register with the Commission as Broker-Dealer when so required and failure to disclose that fact to investors is a material omission for which damages may be claimed under *Section 10b, supra,* and *Rule 10b-5, supra.* The leading case in point is *Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S. Ct. 1456, reh. den. 407 U.S. 916, 92 S. Ct. 2478.* In *Affiliated Ute Citizens, supra,* 85 plaintiffs sought damages for alleged violations by the defendants, in connection with sales by the Plaintiffs of their UDC shares, of *10(b)* of the Securities Exchange Act of 1934, and of *Rule 10b-5.* The Broker-Dealer failed to inform the sellers of shares whether it was acting as broker-dealer. The Supreme Court held that there was a primary duty in part of the Broker to disclose that fact was a

material omission inasmuch as a reasonable investor might have considered the fact important in the making of his or her decision. Accordingly, proof of reliance was not necessary and the requisite element of causation in fact was in fact was therefore established. Followed in *Swanson v. American Consumers Industries, Inc., 475 F. 2d 516 (C.A. 7, Ill. 1953), later appl. 517 F. 2d 555; Roches Bros. Inc. v. Rhoades, 491 F.2d 402 (C.A. 3rd, 1973); Chelsea Associates v. Rapanos, 376 F. Supp. 929 (D.C. Mich. 1974).*

In the case at Bar, Shied and Viking never disclosed to prospective investors whether they were acting as Broker-or-Dealer. Shield never disclosed to investors that they would make a profit eventhough in the Schedule D, Shield stated that it would not make a profit. That failure to disclose to investors whether Shield was acting as a Broker or Dealer was a material omission for which Petitioners are entitled to 10b-5 relief. As to all members of the class, the Court may conclude that there was constructive reliance for had the Petitioners knew that there were substantial over burdens on their investments coupled with the fact that had they known that Shield or Eigel or Viking were acting as Brokers or Dealers, their decision to invest or not to invest might have been different. That failure constituted a device, scheme or artifice to defraud investors. *Rule 10b-5, supra.*

CONCLUSION

In view of the foregoing points and authorities, the conclusion is inescapable that this Petition presents a case in which the United States Court of Appeals for the Sixth Circuit has decided important questions of federal law which conflicts with decisions by other Circuit Courts. The overall judicial benefit which would result in this Court's intervention and exercise of supervisory powers would, inure to the benefit of a wide segment of the investing public.

Respectfully Submitted

/s/

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(202) 393-3900/393-3901

ATTORNEY FOR PETITIONER(S)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AUDREY LEE,

Plaintiff,

v.

Civil No.
C-1-77-99

SHIELD PETROLEUM CORPORATION,
ET AL.,

Defendants.

NOTICE OF CLASS ACTION

TO:

ALL PERSONS WHO FROM DECEMBER, 1969, THROUGH AUGUST, 1974, PURCHASED INTERESTS IN OIL OR GAS DRILLING VETURES FROM SHIELD PETROLEUM, INCORPORATED, VIKING RESOURCES CORPORATION, OR JAMES C. EIGEL

There is now pending before this Court a class laction for damages for alleged violations of the securities laws of the United States, arising out of the sale by Shield Petroleum, Incorporated, Viking Resources Corporation, or James C. Eigel of interests in oil or gas drilling ventures between December, 1969 and August, 1974.

By Order dated July 12, 1977, this Court has determined that this matter may proceed as a class action.

THE NATURE OF THIS LAWSUIT

The Parties:

The plaintiff, Audrey Lee, is the owner of interests in various oil land gas drilling ventures. She has brought this action on behalf of herself and all other investors.

The corporate defendants are Shield Petroleum Corporation, an Ohio corporation, and Viking Resources Corporation, an Ohio corporation. The individual defendant is James C. Eigel, who the plaintiff alleges is the lowner of defendant Shield Petroleum, Inc. and the majority shareholder, principal officer and director of Viking Resources Corporation.

The Class:

The class has been tentatively defined by the Court as follows: "All persons who from December, 1969 through August, 1974 purchased interests in oil and gas drilling ventures from Shield Petroleum, Incorporated, Viking Resources Corporation, or James C. Eigel."

The Complaint:

In Court I, plaintiff asserts violations of Section 17 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. In Count II, plaintiff asserts misappropriation of assets and breach of fiduciary duty. In Count III, plaintiff seeks an accounting and recovery of damages based upon allegations of Counts I and II.

Defendants' Answers:

By answer filed May 5, 1977, defendants deny all allega-

tions of wrongdoing and have, in addition, advanced certain affirmative defenses.

Further Information Available:

This description of the claims and defenses is general and does not purport to cover all of the claims and contentions of the parties. Further information is contained in the files of this lawsuit which are available for inspection at the offices of the Clerk of the United States District Court for the Southern District of Ohio, United States Courthouse, Cincinnati, Ohio.

Consequences of the Suit:

If the plaintiff succeeds in this lawsuit, members of the class of investors may recover money damages. If the defendants succeed in the lawsuit, all of those claims which are asserted in the lawsuit against them will be dismissed and thereafter forever barred, including those asserted on behalf of the class.

THE JUDGMENT, WHETHER FAVORABLE OR NOT, WILL INCLUDE ALL MEMBERS OF THE CLASS WHO DO NOT REQUEST EXCLUSION.

Method of Exclusion:

THE COURT WILL EXCLUDE YOU FROM THE PLAINTIFF CLASS IN THIS LAWSUIT IF YOU SO REQUEST IN WRITING BY SEPTEMBER 15, 1977. If you wish to be excluded, address a letter or postcard to the Clerk of the United States District Court for the Southern District of Ohio, United States Courthouse, Cincinnati, Ohio 45202, stating the following:

1. Name and Address

2. The amount of your investment

3. The date(s) of purchase

4. A statement that you wish exclusion from the class.

Persons who request exclusion will not be entitled to share in the benefits of a judgment if it is favorable to the plaintiff and will not be bound by a judgment if it is adverse to the plaintiff.

Participation:

IF YOU DO NOT REQUEST EXCLUSION, YOU MAY, IF YOU DESIRE, ENTER AND APPEARANCE THROUGH YOUR OWN COUNSEL. SUCH ENTRY OF APPEARANCE BY COUNSEL MUST BE MADE BY SEPTEMBER 25, 1977.

IF YOU DO NOT REQUEST EXCLUSION AND DO NOT ENTER AN APPEARANCE THROUGH COUNSEL OF YOUR OWN CHOOSING, YOU WILL BE REPRESENTED BY PLAINTIFF'S COUNSEL.

THE FOLLOWING ATTORNEYS ARE PRESENTLY ACTING AS COUNSEL FOR PLAINTIFF AND THE CLASS:

Clement Theodore Cooper, Esq.
918 F. Street, N.W. (300-302)
Washington, D.C. 20004

Gene I. Mesh, Esq.
Central Trust Tower
Cincinnati, Ohio 45202

Further Proceedings:

The Order of this Court establishing a class is conditional only and may be altered prior to a decision on the merits. Accordingly, receipt of this Notice by you is not to be construed as a final determination by the Court that you are entitled to participate in the benefits, if any, which ultimately may be realized by the class in this case.

The giving of this notice should not be understood as an expression of any opinion by the Court as to the likelihood of recovery on the part of the plaintiffs or as to the merits of any claims or defenses asserted by either side in this lawsuit.

By Order of The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, Western Division

_____

Clerk of the Court

Date: August 10, 1977

APPENDIX B

UNITED STATES DISTRICT COURT

FILED
SEP 13 1978

FOR THE
SOUTHERN DISTRICT OF OHIO - WESTERN DIV.

CIVIL ACTION FILE NO. C-1-77-99

Audrey Lee, etc..

vs. JUDGMENT

Shield Petroleum, etal

This action came on for trial before the Court, Honorable Carl B. Rubin , United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff Audrey Lee's complaint should be and is hereby dismissed at plaintiff's costs.

Dated at Cincinnati, Ohio , this 13th day of September , 1978.

JOHN D. LYTER
Clerk of Court

/s/
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AUDREY LEE,

Plaintiff,

FILED
JOHN D. LYTER, CLERK
Sep 13 11.16 AM '78
U.S. DISTRICT COURT
SOUTHERN DIST., OHIO
WEST DIV. CINCINNATI

v.

Civil No. C-1-77-99

SHIELD PETROLEUM ET AL.,
Defendants.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court following trial and the presentation of evidence on July 3, 5, 6 and 7, 1978. Plaintiff has asserted class action violations of Sections 17(a) of the Securities act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10-b5 promulgated thereunder. Plaintiff seeks money damages or recission on behalf of herself and a class of investors who had invested with defendants in the drilling and development of oil and gas wells. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact, opinion and Conclusions of Law.

I

FINDINGS OF FACT

1. For a period beginning in 1965, defendant James C. Eigle was engaged in the business of selling to investors fractional shares in proposed oil and gas wells. From 1965 to approximately 1972 he operated under the corporate name of Shield Petroleum Corporation, an Ohio corporation. Subsequent to 1972 he operated under the name of Viking Resources, a wholly owned subsidiary of Shield Petroleum Corporation. At no time was James C. Eigle, Shield Petroleum, or Viking Resources registered as a broker/dealer with the Securities Exchange Commission.

2. During a period from December, 1969, through December, 1971, plaintiff Audrey Lee invested $5,471.88 with Shield Petroleum Corporation. She never invested with Viking Resources. Her investment purchased a 1/64th interest in each of four wells identified as Laura Kidd No. 3, Laura Kidd No. 4, C. Burke Morris, and Knight No. 1. Plaintiff also purchased a 3/64th interest in a well identified as Knight No. 2.[1]

3. Consolidated Gas Company of West Virginia owns mineral rights in large areas of the State of West Virginia. These rights grant to Consolidated Gas Corporation the right to drill for oil and gas subject to the payment to the owner of the fee simple title of 1/8 of all amounts received from sale of the oil or gas. Consolidated Gas Corporation will grant to third persons what is in effect a sublease upon terms and conditions negotiated between them. Such subleases are known as "farm-out agreements" and will be referred to as such hereafter.

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[1]Plaintiff's complaint refers to "Knight No. 3". The evidence presented indicates that this is a misprint and that the correct reference should be Knight No. 2".

Shield Petroleum Corporation negotiated farm-out agreements with Consolidated Gas Corporation for each of the five wells in question. Shield was required to pay as consideration therefor a 1/8th royalty, known as an "override" to Consolidated Gas and was required to sell to Consolidated at a specified price all gas or oil recovered.

4. It was the procedure of Shield Petroleum Corporation to sell interests in each well in 1/64th denominations. The sales of such interests in each well in 1/64th denominations. The sales of such interests set forth a specific sum for 1/64th for drilling the well and an additional sum for completion costs.

The cost of a well is divided into two segments. First, the cost of drilling a hole to a specific agreed upon depth; and second, to place casing therein, seal the casing with cement, perform an operation known as "hydro-fracing" and attach the well to either a gas or oil pipeline. This division of costs enables the well driller to decide whether or not to complete the well after the agreed depth has been reached. Contracts providing a fixed cost for drilling and for completion are known as "turn key" contracts as distinguished from a contract providing a cost per foot of drilling and completion. All contracts referred to herein were of the turn key variety.

5. Details as to each of the wells in question are as follows:

A. The "C. Burke Morris Well" was actually a three-well program located in Gilmer County, West Virginia. Drilling rights were acquired by Shield from Consolidated Gas Corporation in a farm-out agreement dated June 30, 1969. Interests in the three-well program were sold at $1050.00 for a 1/64th interest in the three wells for drilling and $395.00 for a 1/64th interest in the completion of each individual well. Drilling

for Morris Well No. 1 commenced on July 20, 1970 and reached a depth of 1970 feet. Drilling for Morris Well No. 2 commenced on August 14, 1970 and reached a depth of 2,000 feet. Drilling for Morris Well No. 3 commenced on October 9, 1970 and reached a depth of 2071 feet. All three wells were completed and remained in production until April of 1974 when the wells were sold to the Polumbus Corporation. Shield Petroleum Corporation had retained 18/64th in these wells.*

B. The "Knight No. 1 Well" was located in Calhoun County, West Virginia. Drilling rights were acquired by Shield from W. T. Parks in a farm-out agreement dated June 19, 1970. Interests in this well were sold at $150.00 for a 1/64th interest for drilling to the casing points and $375.00 for a 1/64th interest in the completion of the well. Drilling for Knight No. 1 commenced on July 20, 1970, and reached a depth of 2035 feet. This well was completed and remained in production until April of 1974 when it was sold to the Polumbus Corporation. Shield Petroleum retained 33/64th in this well.*

C. The "Knight No. 2 Well" was also located in Calhoun County, West Virginia. Drilling rights were acquired by Shield from W. T. Parks in the June 19, 1970 farm-out agreement. A 1/64th interest was $375.00. Drilling for Knight No. 2 commenced on August 18, 1970, and reached a depth of 2066 feet. This well remained in production until April of 1974 when it was sold in the transaction with Polumbus Corpora-

*While Shields represented to the investors that it would retain only a 16/64th interest, it did in fact retain those additional interests which it could not sell.

tion. Shield Petroleum Corporation retained a 41/64th interest in this well.*

D. The "Laura Kidd No. 3 Well" was located in Gilmer County, West Virginia. Drilling rights were acquired by Shield from Consolidated Gas Corporation in a farm-out agreement dated May 15, 1969. A 1/64th interest for drilling to the casing point sold for $350.00 and the cost of completion for a 1/64th interest was $375.00. Drilling commenced on January 26, 1970, and reached a depth of 1736 feet. This well was plugged and abandoned on February 27, 1970. Shield Petroleum Corporation retained a 17/64ths interest in this well.*

E. The "Laura Kidd No. 4 Well" is also located in Gilmer County, West Virginia. Drilling rights for this well were also acquired from Consolidated Gas Corporation in a farm-out agreement dated May 15, 1969. A 1/64th interest for drilling to the casing point sold for $350.00 and the cost of drilling to completion was $390.00 for each 1/64th interest. Neither party submitted documents regarding this well. The dates and depth of drilling are not available. This well was included in the transaction with the Polumbus Corporation in April of 1974. shield Petroleum Corporation retained a 38/64ths interest in this well.*

6. No evidence has been presented that any of the defendants failed to drill any of the wells in question in the place agreed upon or to the depth specified. No evidence has been presented that any of the defendants made excessive charges for work performed or failed to perform any services agreed upon.

II

OPINION

There is a threshold question that must be determined before this matter may be decided on its merits. On July 12, 1977 this matter was conditionally certified as a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure. The class at that time was described as:

> All persons who from December, 1969 through August, 1974 purchased and retained as of February 22, 1977 interests in oil or gas drilling ventures from Shield Petroleum, Inc., Viking Resources Corporation of James C. Eigel.

The trial of this case has disclosed first that the plaintiff never invested with Viking Resources Corporation and second, that she failed to act within the appropriate statute of limitations. Authority for the first proposition may be found in Uncontroverted Fact 24 of the Pretrial Order and in the evidence presented. Plaintiff invested in five Shield wells and in nothing else.

The second proposition requires a somewhat more detailed explanation.

Section 15, U.S.C. § 780(a)(1), of the 1934 Act, provides that sales of securities by unregistered brokers or dealers are prohibited. The law appears to be settled that such sales are voidable and subject to recision at a purchaser's option. *Eastside Church of Christ v. Nat'l Plan,* 391 F.2d 357 (5th Cir. 1968). Neither actual damages, nor a causal connection between any damage and the failure to register need be shown. *Eastside, supra.*

It is not so clear, however, which statute of limitations applies to actions under Section 15. Section 29 of the 1934 Act, U.S.C. § 78cc(b), contains a maximum 3-year limitations specifically for violations of U.S.C. § 780(c)(1), but

does not indicate (and case law is unclear) whether such period is applicable to plaintiff's claim herein, Ohio law must provide the limitation.

An assertion of securities fraud in Ohio is subject to a four-year statute of limitations, Ohio Revised Code § 2305.09(c). *Nickels v. Koehler Mgmt, Corp.*, 541 F. 2d 611 (6th Cir. 1976), *cert. den.* 429 U.S. 1074 (1977). Such statute begins to run when the fraud is or should have been discovered. *Gaulin v. K.D.I. Corp.*, 576 F.2d 708 (6th Cir. 1978). Plantiff's assertions regarding absence of proper registration of Shield or Eigle, however, do not amount to a claim of fraud.

That being so, the analogous Ohio statutory provision in this situation is Ohio Rev. Code § 1707.43 which in its current form creates a maximum limitations period of four years (until July 20, 1978, the limitations period was two years), from the date of sale in which a purchaser may void a sale made by an unlicensed broker or dealer. *See* Ohio Rev. Code § 1707.14.

When applied to the facts of this case, any of the above statutes of limitation would bar plaintiff's claim as to the five Shield programs offered. Plaintiff Lee purchased her interests between December, 1969 and December, 1971. This action was commenced February 22, 1977, more than five years after defendant's final sale to plaintiff Lee.

A consideration of the foregoing leads inescapably to the conclusion that prerequisite 3 of Rule 23(a), (Typicality), is not present. Plaintiff is barred by the statute of limitations from asserting claims that may be typical of the claims of the class and proves no claim against the defendant Viking Resources. *It would seem inappropriate to permit claims that are not barred by the statute and claims against Viking Resources to be extinguished by allowing plaintiff to act as a class representative. In view of the*

foregoing, the conditional class certification heretofore entered on July 12, 1977 is now set aside and the disposition of plaintiff's claims whall be deemed dispositive as to her alone.

III

CONCLUSIONS OF LAW

A. This Court has jurisdiction under U.S.C. § 22(a), 27, and 78(aa).

B. Where a plaintiff claims are barred by statutes of limitations such plaintiff is not typical of a class of claimants whose similar claim may not be so time barred and such plaintiff may not act as a representative in a class action.

C. Whether 15 U.S.C. § 78(cc)(b), Ohio Revised Code § 2305.09(c) or Ohio Revised Code § 1707.43 applies, an action asserting violation of securities acts is time bared when brought more than five years after the final purchase of securities evidencing fractal interests in oil and gas wells.

D. In view of Findings of Fact 2 and 6, plaintiff's complaint should be and it is hereby dismissed at plantiff's complaint should be and it is hereby DISMISSED at plaintiff's costs.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/

Carl B. Rubin
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
JOHN D. LYTER, CLERK
Sep 13 2.12 AM '78
U.S. DISTRICT COURT
SOUTHERN DIST., OHIO
WEST DIV. CINCINNATI

AUDREY LEE,
Plaintiff,

v.

Civil No. C-1-77-99

SHIELD PETROLEUM
CORPORATION et al
Defendants.

ORDER

This matter is before the Court on plaintiff's motion for reconsideration and to vacate judgment and order (Document 69), on defendants' motion to amend Findings of Fact and Conclusions of Law (Document 70) and upon defendants' motion to amend Findings of Fact, Opinion and Conclusions of Law (Document 71).

Upon consideration of such motions, the Court has reviewed its Findings of Fact, Opinion and Conclusions of Law and concludes that they deal appropriately with the issues raised in this matter.

Finding of Fact 2 is incorrect in regard to the finding that plaintiff Audrey M. Lee invested with defendants during the period of December, 1969 through December, 1971. The date, "December, 1971" in such finding of fact and in the fourth paragraph on p.6 of the opinion is hereby amended to read: "December, 1970."

Insofar as defendants sought the amendment of the finding of fact as set forth in the preceding paragraph herein, such motion is hereby GRANTED. As to all other branches of such motion, it is hereby DENIED.

Plaintiff's motion for reconsideration and to vacate the judgment and order is hereby DENIED.

It is so ORDERED.

/s/

Carl B. Rubin
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AUDREY LEE,
Plaintiff,

v.

SHIELD PETROLEUM ET AL.,
Defendants.

FILED
JOHN D. LYTER, CLERK
Sep 13 11.14 AM '78
U.S. DISTRICT COURT
SOUTHERN DIST., OHIO
WEST DIV. CINCINNATI

Civil No. C-1-77-99

ORDER

This matter is before the Court for consideration of plaintiff's motion to supplant record by submittal of evidence. Plaintiff seeks to include in the exhibits in this matter files of the Securities Exchange Commission. Defendant has filed a memorandum contra thereto.

In view of the Court's determination that plaintiff's claims are barred by the statute of limitations and that plaintiff is not an appropriate class representative, the question of admissibility of the records in question need not be reached. Plaintiff's motion is hereby DENIED as moot.

It is so ORDERED.

/s/

Carl B. Rubin
United States District Judge

Nos. 79-3416/7

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 23 1982
John P. Hehman,
Clerk

AUDREY M. LEE,
Plaintiff-Appellant
Cross-Appelleed

v.

SHIELD PETROLEUM CORP., VIKING RESOURCES CORP. and JAMES C. EIGEL,

Defendant-Appellee
Cross-Appellant

ORDER

Before: EDWARDS, Chief Judge; MERRIT and BROWN, Circuit Judges

In this federal securities fraud case, the District Court dismissed the action and decertified the class previously given tentative approval. The basis for the District Court's action was its conclusion after hearing the facts that the named plaintiff's action is barred by the applicable statute of limitations period so as to permit plaintiff's late filing of the case. We agree with the District Court that it is well established that in federal securities fraud actions brought in Ohio the four year statute applies, *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976); *Gaudin v. KDI Corp.*, 541 F.2d 611 (6th Cir. 1978) *aff'ing* 417 F. Sup. 620 (S.D. Ohio 1976), that the plaintiff did not present facts sufficient to extend the running of the statute until the date of the filing of this action and that in light of

these facts the case could not be maintained as a class action by the named plaintiff.

Upon the advice of her lawyer, a previous investor in oil programs of Shield Petroleum, the named plaintiff bought for approximately $5,000 in 1969 and 1970 a 1/64th interest in four oil and gas ventures sold by the defendant, Shield, and a 3/64th interest in one such program. She did not file suit until more than six years after the last purchase. Within two years following the date of her last purchase, she and her adviser were on notice that the royalty returns were minimal and that the oil venture, described by her adviser from the beginning as "risky," was unsuccessful. The facts as developed at trial do not show that the defendants fraudulently concealed geological, economic or other information concerning the venture which would prevent the filing of suit within the statutory period; nor do the facts as developed in the court below show that plaintiff or her adviser pursued with the required diligence an investigation of the reasons for the failure of the venture. In short, we do not find any basis in the record for upsetting as clearly erroneous the findings of the District Court that led to its conclusion that the plaintiff's reliance on the doctrine of equitable tolling is misplaced

Since the named plaintiff's action is barred by the statute of limitations, the District Court did not err in decertifying the class of Shield investors previously given its tentative approval by order. A named plaintiff whose action is barred by the statute of limitations cannot adequately represent such a class. Neither did the court abuse its discretion in refusing to permit immediately prior to trial other investors in different oil drilling programs sold by Viking Resources Corp., programs in which the named plaintiff did not invest, to intervene as named plaintiffs.

The defendants' cross-appeal is also without merit. The District Court did not err in its ruling that, having decertified the class, it could not then bind the class to a ruling that claims by all class members are barred by the statute of limitations. Neither did the District Court err in refusing to rule on the merits of the broker-dealer issue in defendants' favor in light of its dismissal of the action on statute of limitations grounds.

The District Court was correct in ruling that plaintiff's case is barred by the statute of limitations, and its rulings on other subsidiary issues flow logically from this conclusion.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk

By _____
Deputy Clerk

Issued as Mandate: April 14, 1982
Costs: None

Nos. 79-3416
79-3417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUDREY M. LEE,	:	FILED APR 22 1982 John P. Hehman, Clerk
Plaintiff-Appellant Cross-Appelleed	:	
v.	:	ORDER
SHIELD PETROLEUM CORP., VIKING RESOURCES CORP. and JAMES C. EIGEL,	:	
Defendant-Appellee Cross-Appellant	:	

It appearing that the mandate in the above entitled appeals was improvidently issued;

IT IS ORDERED that the mandate be, and it hereby is, recalled.

ENTERED BY ORDER OF THE COURT

/s/

John P. Hehman, Clerk

Nos. 79-3416/7

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 11 1982
John P. Hehman,
Clerk

AUDREY M. LEE,
Plaintiff-Appellant
Cross-Appellee

v.

SHIELD PETROLEUM CORP., VIKING RESOURCES CORP. and JAMES C. EIGEL,

Defendant-Appellee
Cross-Appellant

ORDER DENYING PETITION FOR REHEARING

Before: EDWARDS, Chief Judge; MERRITT and BROWN, Circuit Judges

No judge of the court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-234

SUPREME COURT OF THE UNITED STATES

October Term, 1982

AUDREY M. LEE, *et al.*,
Petitioner (s),

v.

SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON BEHALF OF RESPONDENTS SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION AND JAMES C. EIGEL

JAMES R. ADAMS
(Counsel of Record)
(Counsel for Respondents
Shield Petroleum Corporation,
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I.

QUESTIONS PRESENTED

1. WHERE THE INITIAL CERTIFICATION OF THE CLASS WAS ONLY TENTATIVE, MAY A DISTRICT COURT DECERTIFY THE CLASS AT THE CONCLUSION OF TRIAL BUT BEFORE RULING ON THE MERITS?

2. WHETHER PETITIONER'S REQUEST THAT THE DISTRICT COURT DEFER ITS DECISION ON A MOTION TO INTERVENE CONSTITUTES "DENIAL" OF THE MOTION.

3. WHETHER THE ENTIRE INVESTIGATIVE FILE OF THE SECURITIES AND EXCHANGE COMMISSION MAY BE INTRODUCED AFTER THE CONCLUSION OF TRIAL ON THE MERITS, AND AFTER THE COURT'S RULING THAT THE PETITIONER'S CLAIMS ARE TIME-BARRED.

4. WHETHER AN ACTION BASED ON FAILURE TO REGISTER AS A BROKER-DEALER CONSTITUTES AN ACTION BASED ON FRAUD, WHICH CAUSE OF ACTION, IF ANY, WAS NEVERTHELESS TIME-BARRED.

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TABLE OF OTHER AUTHORITIES

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-234

AUDREY M. LEE, *et al.*,

Petitioner (s),

v.

SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON BEHALF OF RESPONDENTS SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION AND JAMES C. EIGEL

Respondents Shield Petroleum Corporation, Viking Resources Corporation and James C. Eigel respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit, Case No. 79-3416/17. The opinion below is unreported but is set forth in Petitioner's Appendix at p. 18a.

STATEMENT OF THE CASE

Respondent Shield Petroleum Corporation ("Shield") offered oil and gas drilling ventures pursuant to the Regulation B exemption under the Securities Act of 1933, 15 U.S.C. § 77c(b). The offering circulars are known as Schedule D circulars ("the Circulars"). In 1969 and 1970, Petitioner invested a total of $5,471.88 with Shield by purchasing certain 1/64th interests in five wells to be drilled by Shield in accordance with the Circulars. Petitioner invested on the advice of her attorney, who also represented her in this case, Clement Theodore Cooper. Mr. Cooper was himself an investor in other Shield programs.

Petitioner did *not* invest in any of the public drilling programs or private limited partnerships offered by Viking Resources Corporation ("Viking").

James C. Eigel ("Eigel") never sold any interests in these programs in his individual capacity, although he and other officers of Shield did sell the Regulation B, Schedule D interests on behalf of Shield. Shield did not offer any programs after 1970. The 1971 and 1972 Viking public oil and gas programs were sold through broker-dealers registered with the National Association of Securities Dealers ("NASD"). Eigel registered as a broker-dealer in 1972, prior to the sale of the 1972 Viking program and prior to the sale of limited partnership interests offered in other programs in 1972-1974.

Each of the wells in which Petitioner invested was drilled, completed and, where commercially feasible, placed into production by Shield. Petitioner's Appendix, pp. 9a - 11a. Petitioner presented no evidence which demonstrated any impropriety in the drilling of the wells, or the payment or amount of royalties to herself and the other investors in those programs. Petitioner presented no evidence that

Respondents fraudulently concealed any information from the investors. Petitioner's Appendix, p. 19a.

Under each Regulation B, Schedule D program, Shield was required to retain at least 16/64ths interest in each well. In addition, any unsold interests in the programs were retained by Shield. Petitioner's Appendix p. 10a. Because Shield retained ownership interests in each well in which Petitioner was an investor (Petitioner's Appendix, pp. 10a - 11a), Shield was entitled to receive royalty payments in proportion to its ownership interest. Petitioner presented no evidence concerning improper payment of royalties to Shield, or excessive charges by Respondents for the work performed for drilling, testing or completing the wells.

As the district court found, Petitioner proved no claim against Viking. Petitioner's Appendix, p. 13a.

In a timely manner after the commencement of this suit, the district court issued a class action certification order (Petitioner's Appendix, pp. 1a - 5a) expressly stating in its order that the class was only being "tentatively defined" (Petitioner's Appendix, p.2a), and that certification was "conditional only and may be altered prior to a decision on the merits." Petitioner's Appendix, p. 5a. The conditional certification of the class was consistent with the provisions of Rule 23 (c) (1), Federal Rules of Civil Procedure. The Notice of Class Action also stated that certain affirmative defenses had been advanced by Respondents and that all allegations of wrongdoing had been denied. Petitioner's Appendix, p. 3a. The affirmative defenses included the defense that Petitioner's claims were barred by the applicable statute of limitations.

Regarding the statute of limitations, Respondents note that Petitioner's last purchase of Shield's interests was made in December, 1970 (Petitioner's Appendix, p. 15a), and

that suit was not commenced until more than six years later, in February, 1977. Petitioner's Appendix, p. 13a.

Petitioner asserted as one basis for relief the failure of the sellers of the Shield Regulation B, Schedule D programs to register as broker-dealers. After viewing the various statutes of limitations which might apply, the district court found the claim to be time-barred. Petitioner's Appendix, pp. 12a - 13a. Having held that mere failure to register as a broker-dealer would not support a claim of fraud (Petitioner's Appendix, p. 13a), and given Petitioner's lack of any proof that the applicable statute of limitations was tolled for any reason, the remaining claims were dismissed as to Petitioner. Petitioner's Appendix, p. 13a - 14a.

Prior to dismissing the remainder of the suit as being time-barred, the district court had granted Respondent's motion for a directed verdict as to the majority of the fraud allegations in the Complaint for the reason that Petitioner had offered no evidence which proved these counts. Respondents' Appendix, pp. 4a - 8a.

With regard to the broker-dealer issue as it pertained to the sale of the Viking programs in 1970 and 1971, Petitioner presented no evidence which would have tolled the applicable four year statute of limitations until February, 1977. Therefore, even had the class not been decertified because of the inadequacy of Petitioner's individual capacity as the class representative, the claims as to the other investors were also necessarily time-barred by Petitioner's unexcused delay in commencement of the action on their behalf. Moreover, Petitioner's statement of the statute of limitation issue as it pertains to the broker-dealer question ignores the fact that the 1971 Viking program was sold on behalf of Viking by NASD registered broker-dealers.

Immediately prior to the commencement of the trial, Petitioner presented argument in support of a motion to

intervene pursuant to Rule 24, Federal Rules of Civil Procedure. The putative intervenors were investors in the Viking oil and gas programs and, as such, were already included in the class as defined by the Court's class certification order. Petitioner's Appendix, p. 2a. The motion to intervene was *not* denied by the district court. Rather, before trial, Petitioner asked the court to "defer" ruling on the motion to intervene, subject to it being withdrawn by Petitioner. Respondents' Appendix, pp. 1a - 3a. The matter was never again raised by Petitioner.

After the conclusion of the trial, Petitioner sought to introduce a copy of an investigative file obtained from the Securities and Exchange Commission. This "motion to supplant the record" was denied as moot since Petitioner's claims had already been found to be time-barred. Petitioner's Appendix, p. 17a. Accordingly, no ruling as to the admissibility of all or any part of the Securities and Exchange Commission files was made by the district court.

The Sixth Circuit Court of Appeals affirmed (Petitioner's Appendix, pp. 18a - 20a), holding that Petitioner's claim was time-barred, that there had been no tolling of the applicable statute of limitations, and that Petitioner was not an adequate class representative. The Sixth Circuit held that, since the Petitioner's claims were time-barred, the district court's rulings on all other subsidiary issues flow logically from this conclusion. Petitioner's Appendix, p. 20a.

REASONS TO DENY WRIT

Petitioner's brief fails to address the factual basis for the decertification of the class.

The Petitioner waited more than six years from the date of her last purchase of any interest in a Shield program until commencing suit. Both Petitioner and her attorney and advisor, Clement T. Cooper, were aware within two years of Petitioner's last such purchase that the wells were returning minimal royalties, and Mr. Cooper had advised Petitioner that an oil and gas investment was "risky." Petitioner's Appendix, p. 19a.

The underlying issue which Petitioner avoids throughout her Brief is that the claims are necessarily time-barred as the result of her failure to demonstrate any fraudulent concealment of geological, economic or other information concerning any of the Shield or Viking drilling ventures. Petitioner's Appendix, p. 19a. Petitioner also studiously avoids the necessary consequences of her failure, and that of her attorney and advisor, to pursue with the required diligence an investigation of the reasons for the failure of the drilling ventures. Petitioner's Appendix, p. 19a. This case presents a classic fact pattern where the doctrine of equitable tolling of the statute of limitations does not apply.

The other issues raised by Petitioner crumble on the unstable foundation of her time-barred claims. The district court had the power to decertify the tentatively certified class at any time prior to its decision on the merits. Rule 23 (c) (1), Federal Rules of Civil Procedure. Because Petitioner's claims were time-barred, she ceased to be an adequate class representative. Petitioner's Appendix, p. 19a. The tentatively certified class became fatally infirm and had to be decertified by the district court before it ruled on the merits of Petitioner's claims in order to preserve any claim which other putative class members may have had.

With regard to the motion to intervene, the motion was in effect withdrawn by Petitioner's counsel. Contrary to Petitioner's representation, the motion was not "denied" by the district court at any time in the course of the proceedings below. Respondents' Appendix, pp. 1a - 3a.

The attempt by Petitioner to introduce the Securities and Exchange Commission file after the conclusion of trial was properly denied as moot. No ruling was made by the district court on the admissibility of part or all of these files. Petitioner's Appendix, p. 17a.

Finally, the contention that the broker-dealer issue amounts to an action in fraud was specifically rejected by the district court. Petitioner's Appendix, p. 13a. While it is the position of Respondents that under the Regulation B exemption to the Securities Act of 1933 they were not required to register as a broker-dealer for the sale of programs in 1969 and 1970, any claim by Petitioner based on such a failure to register was absolutely time-barred under any applicable statute of limitations. The same is true for any sale of the Viking public programs in 1970 and 1971. *Nichels* v. *Koehler Mgmt. Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. den.* 429 U.S. 1074 (1977); *Gaudin* v. *K.D.I. Corp.*, 576 F.2d 708 (6th Cir. 1978), *aff'ing* 417 F.Supp. 620 (S.D. Ohio 1976).

Contrary to Petitioner's representations, there has been no showing: (a) that the Sixth Circuit Court of Appeals rendered a decision which is in conflict with the decisions of other Courts of Appeal involving similar issues, or (b) that the Sixth Circuit Court of Appeals has decided a federal question in such a way as to conflict with prior decisions of this Court, or (c) that the Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Rather than acknowledge the failure of proof on the merits which resulted in the directed verdict in favor of Respondents on the majority of Petitioner's claims (Respondents' Appendix, pp. 5a - 8a), the Petitioner devotes the majority of her Petition to reciting the unproven and unsubstantiated allegations in her Complaint. By merely repeating her contentions, Petitioner apparently seeks to avoid the fatal consequences of her unexplained failure to commence her suit in a timely manner.

CONCLUSION

For all of the reasons discussed above, this Court must reject the Petition for Writ of Certiorari. Given the absolute failure of Petitioner's proof on Respondents' statute of limitations defense, all other issues which Petitioner seeks to raise are moot.

WHEREFORE, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney for Respondents

OF COUNSEL:

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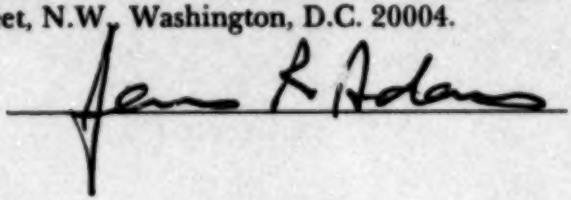
CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served by sending three copies of Respondents' Brief In Opposition to Petition For Writ of Certiorari To The United States Court of Appeals by regular mail, this day September 9, 1982, to Clement Theodore Cooper, Esq., 918 F. Street, N.W., Washington, D.C. 20004.



APPENDIX A

[3] MONDAY MORNING SESSION,

July 3, 1978.

— — —

THE COURT: Gentlemen, good morning.

This is the matter of Audrey Lee versus Shield Petroleum, 77-99.

Gentlemen, there is a motion pending for intervention, and I must confess I don't understand it.

Mr. Mesh, do you wish to be heard on this motion very briefly?

MR. MESH: Thank you, Your Honor. My purpose in addressing the motion this morning is simply to submit an affidavit that has not yet been before the Court in support thereof.

THE COURT: Well, before you do that, Mr. Mesh, let me ask you one or two questions. Do I understand that the same counsel represent the intervening plaintiff?

MR. MESH: Yes.

THE COURT: Do I understand you are seeking to decertify the class action?

MR. MESH: No, Your Honor.

THE COURT: Under what principle of law do you have an intervention with the same counsel in a class action?

[4] MR. MESH: The right of intervention is a right that is available to any class member.

THE COURT: Are you asserting this to be a mandatory intervention or permissive intervention? Under what part of Rule 24 do you proceed?

MR. MESH: I would like to let Mr. Cooper address that particular point, Your Honor, since he drafted the brief.

Let me assure Your Hono that the purpose of asking for intervention at this point was to counter any possible argument that the Defendants could make in any appeal of the Court's class certification. The argument had been made that the interests of the Viking shareholders could not be properly represented by a Shield security-holder, and we are attempting simply —

THE COURT: But that position, Mr. Mesh, was made a long time ago. Now, if I grant intervention, doesn't the Defendant have a right to conduct discovery, take depositions, file interrogatories as to this intervening Plaintiff?

MR. MESH: They have done that with Mr. Miller. His deposition has been taken.

THE COURT: When.

MR. MESH: This week. We have a copy of it today. Mr. Adams has taken his deposition, and [5] we have gone through the discovery process in that regard.

THE COURT: Well, Mr. Mesh, I simply do not understand a motion in a class action of intervention. Now, if somebody wishes to be named and made an additional named Plaintiff, that is something else, but this is intervention under Rule 24, and I a munaware of any application of Rule 24 to a class action.

MR. MESH: I had intended, Your Honor, to suggest that any action on that be deferred at this particular point in time.

THE COURT: Well, all right. My main purpose in interrogating you is to find out whether or not you gentlemen wish to have this decertified as a class action, in which event intervention becomes an entirely different matter.

MR. MESH: Obviously we do not want that.

THE COURT: You have asserted that this Plaintiff meets all prerequisites of the class plaintiff, and I think it

is somewhat late in the day now to be heard that she does not.

MR. MESH: We are not suggesting at all that she does not.

THE COURT: Then, what is the reason for intervention?

[6] MR. MESH: Your Honor, we were contacted by certain class members, these people particularly who did have conversations with counsel regarding their position as Viking securityholders. After conversation, it was the belief of counsel before Your Honor that it might be appropriate to seek intervention in order to have a Viking securityholder named as a party plaintiff in the class and as a representative in the class. I see Your Honor's position in the sense —

THE COURT: I have strong questions about this, Mr. Mesh. I think this is violative of the concept of a class action, and if it is the same attorneys, certainly there is no question as sometimes in an intervention there is the question of whether or not attorneys are experienced enough to handle the case, and somebody wishes to intervene with his own attorney, but that is not the case here.

MR. MESH: Well, Your Honor, I wonder if I could at this point ask the Court to defer any decision on the motion? It may be subject to our request that it be withdrawn at a later time.

THE COURT: Good enough. There is no reason, then, that this matter be heard at this time, and so let's go forward into the merits of the case.

MR. MESH: Very good, Your Honor.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-77-99

AUDREY LEE,

Plaintiff,

v.

SHIELD PETROLEUM, et al,

Defendants.

(Filed July 14, 1978)

ORDER

This matter is before the Court on the motion of defendant for a directed verdict at the conclusion of plaintiffs' case. Such motion was made orally after testimony of seven witnesses and the submission of in excess of one hundred fifty exhibits. Mindful of the admonition of the United States Court of Appeals for the Sixth Circuit in *Sawyer* v. *Methodist Hospital*, 522 F.2d 1102, the Court finds that the plaintiff has presented sufficient evidence to defeat such motion as it relates to the allegations in Paragraphs 1 through 27, inclusive, of plaintiff's complaint.

Plaintiff has not met her burden of proof for the allegations contained in Paragraphs 28 through 34, inclusive, entitled "Misappropriation, Diversion and Commingling

of Investors' money"; Paragraph 35 entitled "Undisclosed Tax Risk"; Paragraphs 36 through 38, inclusive, entitled "Conduct in Connection with Development Calls"; Paragraphs 39 through 41, entitled "Count Two, Common Law Fraud"; and Paragraphs 42 through 48, inclusive, entitled "Count Three, Poor Accounting."

In accordance with the foregoing, defendant's motion for a directed verdict is hereby GRANTED IN PART and DENIED IN PART.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO – WESTERN DIV.

CIVIL ACTION FILE NO. C-1-77-99

AUDREY LEE

v.

SHIELD PETROLEUM, ET AL

(Filed July 14, 1978)

JUDGMENT

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's oral motion for directed verdict is hereby granted in part and denied in part.

Dated at Cincinnati, Ohio, this 14th day of July, 1978.

JOHN D. LYTER
Clerk of Court

/s/ ANN CATANZARO
Deputy Clerk

APPENDIX D

[551] THE COURT: Perhaps I can deal with some of these things. For example, there are some subtitles in here, and perhaps I can deal with those.

The subtitle entitled Undisclosed or Acquisition Arrangements on Page 9, anod that is Paragraphs 23, 24, and 25 — I am not sure I can handle it in this fashion because there are portions of the allegations that simply there is just no proof of.

MR. ADAMS: That's right.

THE COURT: On the other hand, there are items which there is some proof of, and I think that I will simply let that one alone.

Misappropriation, diversion and co-mingling of investors' money, there has been no proof on that, so I will sustain the motion to Paragraphs 28, 29, 30, 31, 32, 33, and 34.

There has been no evidence as to Paragraph 35 entitled Undisclosed Tax Risk.

There has been no evidence as to Paragraphs 36, 37, and 38.

Count 2 which is common law fraud, there has been no evidence of that, and Count 2 will be dismissed.

There has been no evidence as to Count 3 which requests an accounting. That would be Paragraphs 42, 43, 44, 45, 46, 47, and 48. As to those matters, I will grant [552] the motion for directed verdict.

Other than those, I will simply deny the motion, and I would state, Mr. Adams, that evidence that you may wish to present dealing with the solicitation of investment, the investment itself, the procedures used in the drilling of wells are matters that are pertinent, and you may wish to present evidence regarding them.

MR: ADAMS: Solicitation of investments, Your Honor, in the sense of assembling the program from a geological standpoint?

THE COURT: Yes.

MR. ADAMS: And what information we had at hand when we put the program together? I don't want to go into anything more than I need to.

THE COURT: I understand, Mr. Adams, and I am trying not to.

MR. ADAMS: I understand you are not trying to catch me off-guard.

THE COURT: We are both walking a tightrope here. I don't want to mislead you.

MR. ADAMS: I understand.

THE COURT: At this particular point, the evidence before the Court deals almost entirely with the evidence of the last witness, Mr. Yedlosky.

MR. ADAMS: That is all I need to know.